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THE REMEDIAL AUTHORITY OF THE LABOUR ARBITRATOR: A POSTSCRIPT

By MICHAEL STEINBERG*

A. INTRODUCTION

The hostility between arbitrators and judges now resembles open warfare. On one side stand the arbitrators and a few labour lawyers; their weapons are the number of arbitration awards, the inability or unwillingness of many parties to seek judicial review, and the columns of the journals. Their banner is inscribed "Polymer," and they look forward, if not to victory, then to a righteous defeat and posthumous vindication by the legislature.

Their opponents are the judges of the Supreme Courts of Canada and the provinces. Impassive in their gowns, they do not fear the scorn of the academics or the howls of the arbitrators. Their arms are the power of *certiorari* — a sword whose length may be adjusted by its bearer — and the authority of final judgment. This side carries a banner as well. Its motto is almost indecipherable, for the letters melt and rearrange with new assaults. Most often seen is the simple phrase, "Port Arthur."

Comments on the erosion of arbitral authority have most often taken the form of laments. There is indeed much to lament. In the early years of arbitration the arbitrator seemed to have ever-expanding powers to adjust the tension between union and management. In the famous case of *Re Polymer Corp.*, then-Professor Bora Laskin held that an arbitrator had the right to award damages for breach of the collective agreement, and his award was upheld at all levels.¹ To many arbitrators the conclusion was clear: the arbitrator was to have full powers to settle disputes and fix remedies. It was soon clear that the courts felt otherwise. At the present time, the arbitrator's authority has been narrowed far beyond the limits feared by the most pessimistic labour lawyers.

The case of the arbitrator who takes a broad view of his authority by following *Polymer* is eloquently put by Professor Paul C. Weiler in *The Remedial Authority of the Labour Arbitrator: Revised Judicial Version*.² The article presents a simple view: arbitrators understand the needs of the parties, and courts do not. The arbitrators attempt to set things right, but the con-

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¹ *Re Polymer Corp. and Oil, Chemical and Atomic Workers* (1959), 10 L.A.C. 51 (Laskin); aff'd *sub nom. Imbleau v. Laskin* (1961), 26 D.L.R. (2d) 609 (Ont. H.C.); 28 D.L.R. (2d) 81 (Ont. C.A.); [1962] S.C.R. 338.

² (1974), 52 Can. Bar Rev. 29.

servatism of the courts leads to setback after setback. Professor Weiler's solution, as far as it can be discerned, is simple: throw the courts out, he implies, and everything will improve. Such would seem to be the convictions of a man who refers to the current law as a "Judicial Morass."³ But his article does not analyse the court cases in depth. A closer look reveals that the judges are less evil, and the situation more desperate, than Professor Weiler imagines.

Two Supreme Court of Canada cases mark the narrowing of the arbitrator's remedial powers. The effect of the first, *R. v. Arthurs et al. ex parte Port Arthur Shipbuilding Co.*,⁴ was reversed by an amendment to the Ontario *Labour Relations Act* reversing the specific point decided,⁵ but a single phrase from the Supreme Court judgment has coloured all succeeding decisions on the arbitrator's remedial authority.⁶ Those cases rejected the application of various equitable doctrines, until, in *Metropolitan Toronto Board of Commissioners of Police*,⁷ the Ontario Court of Appeal, supported by the Supreme Court of Canada, unequivocally ended arbitral use of rectification. For the first time, arbitrators were forbidden to use one of the equitable remedies in any circumstances. The *Police Commissioners* case, then, marks a new hardening of judicial attitudes. Once the nature of rectification is clear, it will be seen that the attack on rectification goes to the heart of an arbitrator's authority.

B. THE SCOPE OF THE LABOUR ARBITRATOR'S AUTHORITY

It is common practice for arbitrators to review the circumstances of disciplinary discharges, and to reinstate employees whom the board finds have not been discharged for "just" or "proper" cause. Until 1969 many arbitrators also looked at mitigating factors, such as the seriousness of the offence and the work record of the employee, and would reduce discharge to a lesser penalty in cases where cause for discipline existed, but where the decision to discharge an employee seemed too harsh. In the *Port Arthur Shipbuilding* case, Professor Harry Arthurs reinstated three employees, reducing their discharge to several months' suspension. The Supreme Court of Canada quashed his award. In their view, he had found cause for discipline,⁸ but he did not have the power to substitute his penalty for that chosen by the company.

The final paragraph of the unanimous decision of the Court, delivered by Judson J., has haunted labour arbitration:

³ *Id.* at 41.

⁴ Award: (1966), 17 L.A.C. 109 (Arthurs); quashed (1967), 60 D.L.R. (2d) 214 (Ont. H.C.); rev'd (1967), 62 D.L.R. (2d) 342 (Ont. C.A.); rev'd [1969] S.C.R. 85. Cited throughout as the *Port Arthur* case, or as *Port Arthur Shipbuilding*.

⁵ R.S.O. 1970, c. 232, s. 37(8).

⁶ The cases are conveniently summarized in Weiler, *supra*, note 2.

⁷ Award unreported; quashed (1972), 72 C.L.L.C. 14,122 (Ont. H.C.); aff'd 72 C.L.L.C. 14,125 (Ont. C.A.); (1974), 74 C.L.L.C. 14,223 (S.C.C.). Cited throughout as the *Police Commissioners* case.

⁸ [1969] S.C.R. 85 at 89.

An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in some detail. It has no inherent powers to amend, modify, or ignore the collective agreement.⁹

Professor Weiler finds himself unable to comprehend this statement. "[I]f this is so," he asks, "why can [the arbitrator] order reinstatement and award damages in cases of unjustified discharge, where these powers also are not conferred by the collective agreement?"¹⁰ The question would be relevant if the paragraph were the sum of the Court's reasoning. It is not. The company argument, accepted by the Supreme Court, was that the arbitrator had exceeded his authority in assuming rights reserved to management by the collective agreement. Substitution of a penalty was an assumption of a management power, rather than a remedy.

The decisions reviewing the *Polymer* case, *sub nom. Imbleau v. Laskin*,¹¹ had held that the arbitrator could impose damages for a breach of the agreement and, thus, implied a broad scope for arbitral remedies. These decisions were distinguished by Mr. Justice Brooke in the High Court of Justice. In his opinion, the issue in *Port Arthur* was not the appropriateness of the remedy, but whether substitution of a penalty was a remedy or not. He held that the arbitrator had not fashioned a remedy to adjust a breach of the agreement, but had assumed a right reserved by that agreement to management:

The collective agreement reserved to management the right to discharge for proper cause provided that that right was not exercised in a manner inconsistent with the agreement. . . . [There is nothing] in the award which suggests that management exercised its rights in a manner inconsistent with any of the provisions of the agreement. . . . The majority of the board . . . stated . . . '[T]he arbitrator may fashion appropriate remedies pursuant to his general mandate to make a final and binding determination of the issues presented to him. . . .' In *Imbleau v. Laskin* . . . the learned arbitrator did not in my opinion 'fashion a remedy', rather he gave consequential relief which flowed from the breach of the collective agreement which had been established in the evidence before him. . . . In my opinion, it would be more than fashioning a remedy to substitute a term of suspension for discharge; rather it would be a decision inconsistent with the collective agreement which reserves to the applicant the right to demote, suspend, or discharge for proper cause. [emphasis added]¹²

However confused the references to "fashioning a remedy" may be, it is clear that the board's error, in Mr. Justice Brooke's opinion, was its assumption of the management prerogative to make a choice among demotion, suspension, and discharge once "proper cause" was found. One may argue that the distinction between reviewing the propriety of any discipline, and reviewing the form of discipline taken, is an artificial one. But the distinction was made by both the Ontario High Court of Justice and the Supreme Court of Canada. Interpretation of these judgments is not aided by a refusal to make it along with them.

⁹ *Id.* at 95-96.

¹⁰ Weiler, *supra*, note 2 at 40.

¹¹ *Supra*, note 1.

¹² 60 D.L.R. (2d) 214 at 217-19.

The Court of Appeal upheld the board's ruling, over a dissent from Mr. Justice Schroeder. The majority held that the case fell within *Imbleau v. Laskin*; their reasoning, though perhaps preferable, is not relevant to an understanding of the Supreme Court judgment. The dissent is more important for that purpose:

The reservation to the respondent company of management's rights as embodied in paragraph 3.01 recognizes the company's right not only to discipline an employee for proper cause but to 'demote, suspend or discharge him for proper cause'. The choice of penalty is thereby committed to management and to it alone. Had the parties intended that a board hearing a grievance submission should be entitled to substitute suspension for dismissal, that intent should have been clearly expressed in appropriate language. In the absence of such a provision there was no authority in the board to pursue that course. . . . [T]hat right was expressly reserved to management as its exclusive function in unambiguous terms to which the union gave unqualified assent and recognition.¹³

Mr. Justice Schroeder was, thus, even more explicit than Mr. Justice Brooke in basing his judgment on management rights, rather than the limits of arbitral remedies. It is significant that both judgments were approved by the Supreme Court of Canada:

The task of the board of arbitration in this case was to determine whether there was proper cause. The findings of fact actually made and the only findings of fact that the board could possibly make establish that there was proper cause. Then there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The board, however, did not limit its task in this way. It assumed the function of management. In this case it determined, not whether there had been proper cause, but whether the company, having proper cause, should have exercised the power of dismissal. The board substituted its judgment for the judgment of management and found in favour of suspension.

The sole issue in this case was whether the three employees left their jobs to work for someone else and whether this fact was a proper cause for discipline. Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration. This was the opinion of Mr. Justice Brooke and Mr. Justice Schroeder, dissenting on appeal, and with this opinion I agree.

Notwithstanding obvious and serious breaches of the collective agreement by these three individuals, the board has, in effect, said 'We will hold that these breaches are not a proper cause for dismissal but call for suspension.'

A collective agreement is binding on employer and employees. These were not trivial breaches and the board had no power to substitute its own judgment for that of management in the circumstances of this case. If this kind of review is to be given to a board under s. 3.03, it should be given in express terms, namely, that the management's authority to demote, suspend or discharge will be subject to full review by the board of arbitration. Management would then understand what its position would be. But as the agreement is presently drawn, the board's power is limited to a determination whether management went beyond its authority in this case. The question before them was, could an honest management, looking at the group of employees as a whole and at the interests of the company, have reached the conclusion that they did? In other words, did management go beyond its rights? There is only one answer to this question and the answer is 'No'. It was the board that exceeded its authority in reviewing the decision of management by purporting to exercise a full appellate function.

Further, and as I have already indicated, there is no doubt in my mind that

¹³ 62 D.L.R. (2d) 342 at 347-48.

the award should be squashed. An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in some detail. It has no inherent powers to amend, modify or ignore the collective agreement. But this is exactly what this board did in this case, and it was clearly in error in doing so, and its award should be quashed.¹⁴

The Court's final statement that the board had "no inherent powers of review" reflects its view of arbitral assumption of management rights, not of arbitral remedial powers. The management decision on discipline can only be reviewed in the terms provided for in the agreement; it is not a quasi-judicial proceeding reviewable by the board, as a decision in a lower court is by an appellate body. Once a violation of the agreement is found, the board may employ a full range of remedies, following the authority of *Imbleau v. Laskin*.¹⁵ But the substantive matters reviewable by the board are set out in the agreement.

One would think it difficult to miss the Court's emphasis on management rights. In almost all of the cases that purport to apply the *Port Arthur* case, however, the final paragraph is cited out of context, and then applied to cases where the board has created no substantive rights. This interpretation is shared by Professor Weiler, who in all other matters disagrees with this line of cases. In *Port Arthur*, says Weiler, "[t]he assumption seemed to be that because the arbitrator could not exercise the management's power to impose a suspension, he could not find the discharge improper and order reinstatement." He complains, "The second conclusion simply does not follow from the first."¹⁶ Indeed it does not, and Mr. Justice Judson would certainly agree with him. There is no doubt that the Supreme Court approved of the arbitrator's power to order reinstatement if the discharge was found to have been imposed for no cause or improper cause. The assumption Professor Weiler finds in the *Port Arthur* case is invented only to be knocked down.

In a later judicial application of the *Port Arthur* case, *King Size Photo Service*,¹⁷ the arbitrator had found an employee negligent, but had decided that the negligence was not proper cause for discharge or, in fact, any discipline at all.¹⁸ Chief Justice Bence of the Saskatchewan Queen's Bench distinguished the *Port Arthur* case:

The conclusions of Judson, J., seem to me to be logical and irrefutable. The Arbitration Board [in the *Port Arthur* case] found that there was proper or just cause for dismissal in that the employees had broken a specific term of the agreement. The board once having reached that conclusion had no right to interfere with the prerogative of management in discharging the employees for cause. In the instant case, there was no such finding. There was one to the contrary.¹⁹

This may not be an accurate summary of the board's findings in the

¹⁴ [1969] S.C.R. 85 at 89-90, per Judson J.

¹⁵ *Supra*, note 1.

¹⁶ Weiler, *supra*, note 2 at 38.

¹⁷ 70 C.L.L.C. 14,042.

¹⁸ *Id.* at 14,208.

¹⁹ *Id.* at 14,210.

Port Arthur case, for the board avoided mention of "just" cause, but it reflects the attitude of the Supreme Court better than does Professor Weiler's condemnation. If the wording of Mr. Justice Judson's argument is broader, suggesting that the finding of a wrong meriting any discipline takes the matter out of the arbitrator's discretion, the Saskatchewan judgment at least preserves the distinction between the finding of cause and the substitution of a penalty for extraneous factors.²⁰ Once this distinction is lost, the Supreme Court decision seems to hold that an arbitrator has no powers beyond those expressly granted in the agreement. The unfortunate effect of the *Port Arthur* case is not its holding — that is fairly narrow, in many ways defensible, and has been limited by subsequent cases and, in Ontario, by statute.²¹ The misfortune is the application of the Supreme Court's final comments, taken out of context, to situations not contemplated by the Court.

The cases which apply *Port Arthur Shipbuilding* are discussed in detail in Professor Weiler's article,²² and little would be gained by reviewing them here. *Port Arthur* — or, rather, its final paragraph — has been applied to deny the board the power to use statutes in reaching its decision;²³ the authority to apply the doctrine of equitable estoppel;²⁴ and the authority to rectify an agreement where there has been an error in transcribing the actual bargain of the parties.²⁵ None of these cases involves the assumption of extra rights — substantive rights — against one of the parties. In all of them, except those involving the application of statutes,²⁶ what has been rejected is the arbitrator's power to apply equitable remedies. It was this onslaught against equity that led a recent board to conclude that it had no power to grant equitable relief except when granted that right expressly.²⁷ It would seem that common law and equity, supposedly fused in the eighteen-eighties,²⁸ are coming unstuck again in the field of labour arbitration. It cannot be

²⁰ See also *Coulson Prescott Logging v. International Woodworkers of America Local 1-85*, [1972] 4 W.W.R. 51 (B.C.C.A.), which held that mitigating factors could go to a finding of cause, rather than to amelioration of the penalty after a finding of cause. This distinguishes the *Port Arthur* case almost to nothingness and indicates that, even if logically and legally defensible, the *Port Arthur* decision fails to meet the needs of contemporary industrial relations.

²¹ R.S.O. 1970, c. 232, s. 37(8).

²² Weiler, *supra*, note 2 at 41 *et seq.*

²³ See cases in *id.* at 44-49; and Weiler, *The Arbitrator, The Collective Agreement, And The Law* (1972), 10 Osgoode Hall L. J. 141.

²⁴ *Sarnia General Hospital* (1973), 73 C.L.L.C. 14,157 (Ont. Div. Ct.).

²⁵ *Id.*; and the *Police Commissioners* case, *supra*, note 7.

²⁶ To anticipate: the same argument to justify arbitrators' equitable power justifies their use of statutes: to avoid multiplicity of proceedings the arbitrator must be free to apply the law that will be applied by the reviewing authority. Arbitral application of statutes was approved by the Supreme Court of Canada in *United Steel Workers v. Galt Metal Industries* (1974), 74 C.L.L.C. 14,220. See especially the judgment of Laskin C.J.C. at 15,004.

²⁷ *Re Northern Electric Co. and UAW Local 1535* (1972), 1 L.A.C. (2d) 360 (Simmons).

²⁸ By the *Judicature Act*, *infra*, note 30, in Ontario; and parallel statutes in other jurisdictions.

maintained that equity does not function in labour law. What is at issue is the arbitrator's power to apply it.

C. THE ARBITRATOR'S EQUITABLE JURISDICTION

The source of the arbitrator's equitable authority is obscure.²⁹ The *Judicature Act*,³⁰ which effected the fusion of law and equity, does so for "every civil cause or matter."³¹ By the interpretation section of the Act, "'cause' includes an action, suit, or other original proceeding between a plaintiff and a defendant."³² It has been held that proceedings before a judge acting as a *persona designata* are not "causes" for the purposes of the Act,³³ nor are recounts under s. 122 of the *Municipal Act*.³⁴ It is highly unlikely that the *Judicature Act* applies to labour arbitrations.

But it is undeniable that arbitrators are expected to interpret agreements according to the law. One may compare the principles applied to commercial arbitrators:

It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances. This duty is sometimes treated as being imposed by an implied term in the arbitration agreement, but is also implicit in the statutory provisions enabling the court to order a case to be stated upon a point of law and to set aside an award for error of law.³⁵

While a provision that the arbitrator apply the law of the jurisdiction has never been implied into a collective agreement, the courts have clearly assumed jurisdiction to review an award for error of law.³⁶

The law applied must be that decided by the Supreme Courts of the province and of Canada, to which the *Judicature Act* and its equivalents apply.³⁷ The arbitrator must decide according to the combined principles of both law and equity; otherwise the law applied by the arbitrator would not be that applied by the reviewing authority. If the arbitrator were not free to apply equitable doctrines, labour arbitration would resemble the Ontario court system before the passing of the *Judicature Act* in 1881: the arbitrator could base the award on common law alone, and a party with a good equitable

²⁹ The following discussion, which takes Ontario as a model for the other common law provinces, is necessarily sketchy; and it is recognized that most statements may require qualification. Additional precision would only delay the main argument, however, and would not affect the essential validity of the point made.

³⁰ R.S.O. 1970, c. 228. Originally enacted as 1881, 44 Vict., c. 5 (Ont.).

³¹ *Id.*, s. 18.

³² *Id.*, s. 1(b).

³³ *Re Hunt and Lindensmith* (1921), 51 O.L.R. 320.

³⁴ *Re Courneys and Tweed*, [1949] O.R. 270 (C.A.). The Act is R.S.O. 1970, c. 284.

³⁵ A. Walton, ed., *Russell on the Law of Arbitration* (London: Stevens & Sons, 1970) 18th ed., p. 186. Footnotes omitted.

³⁶ See any of the cases cited herein.

³⁷ See the *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 3; and provincial legislation.

defence, or one seeking an equitable remedy, would have to obtain an order, presumably from the Divisional Court, to prohibit or restrain the board from acting, or to command it to act. This would be an unsatisfactory system at the very least.

But does the common "no-amendment" clause oust the arbitrator's equitable authority where the law conflicts with the agreement? The argument has a superficial plausibility. On closer inspection, though, the no-amendment clause merely restates the basic principle of contract interpretation that the arbitrator, or the court, will not make a new contract for the parties. "Its duty is to interpret, not to enact."³⁸ "The Court does not make the contract — the parties to the sale do this — and it is the contract only which the Court can be called upon to enforce or give effect to. . . . It is not permissible for either of the parties to later seek to alter or change that which was agreed to at the time of the sale."³⁹ Yet this duty to be bound by the parties' agreement does not keep courts from applying the rules of equity.

The arbitrator's authority to apply equity comes from outside the parties' submission, and outside the agreement. It is part of his basic duty to interpret the agreement according to the law of the jurisdiction which is imposed by the necessity of meeting judicial standards. It is not ousted by the no-amendment clause, which merely restates the common law principle that the agreement and the law, rather than abstract considerations of "fairness" or "justice," are to be the bases of the arbitrator's decision.

When the courts have dealt specifically with the question of the arbitrator's equitable authority, they have upheld it. Objections to an arbitrator's use of waiver, an equitable doctrine,⁴⁰ were overruled by the Ontario High Court in *R. v. Lane et al., ex parte Green et al.*⁴¹ "This principle [of waiver] is one which *equity requires to be followed* in cases where a right has been lost by reason of the failure to raise an objection prior to arbitration itself." [emphasis added]⁴² This may be contrasted with the judgment of the Divisional Court seven years later: "As to estoppel by conduct, it is rarely, if ever, that such principles can arise in proceedings such as those being reviewed. A Board such as the one whose decision is being questioned . . . has 'no inherent powers to amend, modify or ignore the collective agreement.' The Board is there to interpret the agreement, not to ignore it or to go around it."⁴³ The

³⁸ *Toronto Railway Co. v. City of Toronto* (1906), 37 S.C.R. 430 at 435; aff'd, [1907] A.C. 315 (P.C.).

³⁹ *Granger v. Brydon-Jack* (1919), 26 B.C.R. 498 at 501 (B.C.C.A.).

⁴⁰ Although waiver originated in equity it has been considered a common law doctrine. From the language of the judgment, however, it is clear that the High Court considered waiver in its equitable aspect. See also *Re Civic Employees' Union and Municipality of Metropolitan Toronto* (1962), 34 D.L.R. (2d) 711 (Ont.C.A.), where participation in the constitution of the arbitration board was held to waive the right to object to a misfiled grievance. There were no elements that might have led to a finding of voluntary relinquishment of a right, and the case must be read as supporting the arbitrator's equitable jurisdiction.

⁴¹ (1966), 66 C.L.L.C. 14,137.

⁴² *Id.* at 505.

⁴³ In *Sarnia General Hospital*, *supra*, note 24 at 14,721.

citation supporting this bald assertion is, of course, the out-of-context last paragraph of the *Port Arthur* decision at the Supreme Court.

A few months later, in the case of *Samuel Cooper & Co.*,⁴⁴ the Divisional Court reaffirmed the equitable authority of the arbitrator. The three-man panel included Chief Justice Wells, who had also sat on the *Sarnia Hospital* case; the issue was the power of the arbitrator to issue a mandatory injunction. The court unanimously agreed that he had such a power: "In our opinion the jurisdiction of the arbitrator was sufficiently wide to encompass a full range of remedy, unless expressly limited by the *Labour Relations Act* or the terms of the collective agreement."⁴⁵

The Divisional Court in the *Samuel Cooper* case was not overruling the Supreme Court of Canada. The statements in *Port Arthur Shipbuilding* to the effect that the arbitrator had "no inherent power" dealt with the creation of rights. The Divisional Court, like the Supreme Court in reviewing the *Polymer* case, was speaking of remedies. But in the Manichaean world of labour arbitration, where the *Port Arthur* case has withered away to a phrase, the two are treated as irreconcilable opposites. The phrase from Mr. Justice Judson's decision has acquired an almost statutory force, and it has been used to destroy the arbitrator's equitable powers. In 1972 it was turned on the doctrine of rectification.

D. THE DOCTRINE OF RECTIFICATION

Rectification is an equitable doctrine which arose to prevent the common law from being used as a tool of injustice. Where the parties have agreed to a contract, and all the elements required by law for a valid contract have been met, there may nonetheless have been an error in transcribing the agreement, so that the written form does not represent the bargain the parties made. In such a situation, equity will "rectify" the contract, and allow it to be enforced as agreed, not as written.⁴⁶ In spite of its American name of "reformation,"⁴⁷ the rectified contract is neither a new contract, made for the parties by the court, nor the old contract with a parol variation. "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."⁴⁸ "In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents."⁴⁹ The rectified document *is* the document the parties signed or, rather, it is the document the parties believed they had

⁴⁴ (1973), 73 C.L.L.C. 14,184.

⁴⁵ *Id.* at 14,855.

⁴⁶ See cases in 5 C.E.D. (Ont. 3d) CONTRACTS, s. 157, n. 58; and Keeton, *Rectification of Instruments for Mistake in England* (1936-7), 14 N.Y.U.L.Q. Rev. 319.

⁴⁷ See S. Williston, *The Law of Contracts* (Boston: Little, Brown & Co., n.d.) 3d ed., s. 1585 and notes thereto. This is a deduction from the two terms.

⁴⁸ *Mackenzie v. Coulson* (1889), L.R. 8 Eq. 368 at 375.

⁴⁹ *Lovell and Christmas Ltd. v. Wall* (1911), 104 L.T. 85 at 93 (C.A., per Buckley L.J.).

signed, and equity allows it to take the place of the erroneous document actually executed.⁵⁰

The identity of the rectified contract with the one executed is established by two corollaries to the doctrine. First, the *Statute of Frauds*⁵¹ is no defence when a contract required to be evidenced in writing is to be rectified. Earlier Canadian cases were in conflict, with most holding that the Statute, if pleaded, was a defence to an action for rectification.⁵² But two English cases from 1923 settled the law; the Statute was no defence. The first, the Chancery case of *Craddock Brothers v. Hunt*,⁵³ held: "After rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had been originally drawn in its rectified form . . . and it is that written document, and that alone, of which specific performance is decreed."⁵⁴ The second, *U.S.A. v. Motor Trucks Ltd.*,⁵⁵ was an appeal to the Privy Council from the Ontario Supreme Court, and followed the reasoning of *Craddock Brothers v. Hunt*.⁵⁶ The point has not been disputed since.

It follows naturally from the argument in the *Craddock Brothers* case that no actual record of the bargain need exist outside the one sought to be rectified. Earlier courts had ruled, however, that some actual, enforceable contract must be found *besides* the rectified document, and *dicta* in both of the 1923 cases showed that the full implications of the rectification doctrine had still not been grasped.⁵⁷ It has since been decided that only a continuing intention to contract need exist, as the rectified document stands in the place of the original.⁵⁸ With this final extension the doctrine of rectification is coherent at last.

Rectification returns the written contract to the bargain made by the parties. They have agreed on "Black" but said "White," and the court does not simply change "White" to "Black," but declares that "White" has always read "Black." The court will not second-guess the parties; if the written contract uses the words upon which the parties agreed there can be no rectification. Mutual mistake as to the legal effect of agreed words cannot support an action for rectification.⁵⁹

⁵⁰ *Shipley U.D.C. v. Bradford Corporation*, [1936] 1 Ch. 375 at 398, app'd in *Crane v. Hegeman-Harris Co.*, [1939] 1 All E.R. 662; aff'd [1939] 4 All E.R. 68.

⁵¹ R.S.O. 1970, c. 444.

⁵² See, for example, *Mandziuk v. Czahley*, [1920] 3 W.W.R. 758, 55 D.L.R. 299 (Alta. C.A.); and *Sweitzer v. Granger* (1923), 54 O.L.R. 70 (App. Div.).

⁵³ [1923] 2 Ch. 136.

⁵⁴ *Id.* at 151-52.

⁵⁵ [1924] A.C. 196.

⁵⁶ *Id.* at 202.

⁵⁷ *Craddock Brothers v. Hunt*, *supra*, note 53 at 159; *U.S.A. v. Motor Trucks*, *supra*, note 55 at 200-01.

⁵⁸ *Crane*, *supra*, note 50 at 664; *Joscelyne v. Nissen*, [1970] 1 All E.R. 1213 (C.A.).

⁵⁹ *Rose v. Pim*, [1953] 2 All E.R. 739 at 744 (the "horsebeans case"); *Distillery, etc. Workers v. Canadian Park and Tilford Distilleries Ltd.* (1973), 36 D.L.R. (3d) 632 at 636 (B.C.S.C.).

Rectification must be distinguished from interpretation of a confused contract, and from the explication of an ambiguity. The former is merely the unravelling of a mess of clauses which express the parties' intention, albeit obscurely.⁶⁰ The latter also expresses the parties' intention, but is so poorly drawn that other interpretations are possible; extrinsic evidence is admitted to allow the court to choose the correct one.⁶¹

It had long been assumed that arbitrators possessed the power to rectify collective agreements. In an unreported award of 1953, Professor Bora Laskin, as he then was, held:

Insofar as the Collective Agreement has, by reason of mutual mistake, omitted the prescription of hours for shift workers, the Board sees no reason why an equity of reformation or rectification does not arise, as is usual in similar situations in the case of individual contracts of a commercial or other nature.⁶²

But rectification is a narrow and uncommon remedy, and has rarely been employed by arbitrators. For example, during negotiations, the parties in *Phillips Electronics Industries Ltd.*⁶³ decided to replace a phrase in a holiday-pay clause. In the final copy the phrase was mistakenly inserted in place of the entire clause. The late Judge Reville treated the case as one of contractual ambiguity, which it was not; the clause had no meaning at all. In allowing the clause to be enforced as agreed, rather than as written, the learned arbitrator in fact exercised a power of rectification.

In the *Ottawa Citizen* case,⁶⁴ the overtime clause was limited by reference to other articles in the agreement. One of these references was incorrect; a clerical error had been made in the preparation of the agreement. Judge Thomas cited the unreported *Harris* award,⁶⁵ *Phillips Electronics Industries*, and *Medland Enterprises Ltd.*,⁶⁶ and concluded that he had the power to rectify the agreement. He distinguished between the rectification of an agreement and the resolution of an ambiguity⁶⁷ and in a subsequent award, after hearing evidence on the intention of the parties, rectified the agreement.⁶⁸

Two subsequent decisions by Professor Paul Weiler did not distinguish the two remedies as closely, and it is difficult to decide which was applied. The arbitrator also took a very broad view of rectification, one not supported by English or Canadian authorities; his first award is clearly a mutual mistake as to the legal effect of agreed words. The same error may be present in the

⁶⁰ *Wells v. Blain*, [1927] 1 D.L.R. 687 at 698-99 (Sask. C.A.).

⁶¹ See 5 C.E.D. (Ont. 3d) CONTRACTS, s. 446 and cases cited therein.

⁶² *W. Harris & Co.* (unreported) Nov. 1953 (Laskin), cited in *Re Ottawa Citizen and Ottawa Newspaper Guild* (1965), 16 L.A.C. 338 at 340-41 (Thomas).

⁶³ (1965), 15 L.A.C. 455 (Reville).

⁶⁴ (1965), 16 L.A.C. 338 (Thomas).

⁶⁵ *W. Harris & Co.*, *supra*, note 62.

⁶⁶ (1963), 14 L.A.C. 55. This is reported only as a headnote, so it is not discussed here.

⁶⁷ 16 L.A.C. 338 at 342.

⁶⁸ (1966), 17 L.A.C. 355.

second, but the facts are so obscure that it is difficult to assess the award properly.

In the first award, *Re United Automobile Workers and Ontario Steel Products Co. Ltd.*,⁶⁹ the company medical plan had been replaced by O.H.S.I.P. during the life of the agreement. The possibility of such a change had been discussed during negotiations, and the parties intended that the current level of benefits would be continued, and the company would pay increased premiums up to those required to maintain the existing benefit level. "The company was worried that the Government plan might provide extra benefits at a correspondingly greater premium cost than was currently the case."⁷⁰ The resulting clause read:

If at any time hereafter a Federal or Provincial government passes legislation which directly or indirectly has the effect of providing benefits similar to one or more of the benefits described in the Plan for which the employees as a class shall be eligible, this Agreement shall automatically be revised for the purpose of integrating any Federal or Provincial government plan with the Plan on the expiration of thirty days after the proclamation of such statute or change or on the date such statute or change comes into effect, whichever is later. During such thirty days period or such longer period as may reasonably be required to carry out such integration the Program will be modified, subject to mutual agreement between the Company and the Union, to the extent necessary to make the total benefits under the Insurance Program. The Company will pay that portion of the premium costs of the total benefits that equals but does not exceed its current cost for this Insurance Program. The employees will pay the remaining portion.⁷¹

The arbitrator found an ambiguity in the penultimate sentence, which seems at first to equate "benefits" with "costs"; he read it as, "the Company will pay that portion . . . of the benefits that equals . . . its current cost." It is clear grammatically, however, that "of the total benefits" is a prepositional phrase modifying "costs," and that the sentence means "the Company will pay that portion of the premium costs that equals but does not exceed its current costs." "Of the total benefits" is extraneous. The case for an ambiguity in the article exists, but it is very tenuous.

The true problem in the *Ontario Steel Products* case is that the parties have incorrectly expressed their thoughts. It had always been intended that the existing benefit level be maintained, and that the Company absorb premium increases needed to maintain that level.⁷² Evidence reproduced in the award shows that the union sought assurance that the article would express this agreement, and it may be inferred that both parties believed it would.⁷³ They were wrong. The arbitrator assumed this was a rectification problem; but the words in the document were those agreed upon by the parties. Only the legal *effect* of the words was mistaken. In this case there

⁶⁹ (1970), 21 L.A.C. 430.

⁷⁰ In the finding of the Board; *id.* at 432.

⁷¹ *Id.* at 435-36.

⁷² *Id.* at 431-33 and 437-38.

⁷³ *Loc. cit.*

should have been no rectification in the absence of extreme *mala fides* on behalf of one of the parties.⁷⁴

It is doubtful, then, that the arbitrator's use of rectification in the *Ontario Steel Products* case was justified. The same complaint may be made about the *Police Commissioners* award,⁷⁵ if certain assumptions are made about the facts, for the case is obscure enough in itself. There were two agreements, referred to as the 1969 and 1970 agreements. The 1969 agreement adopted the Rand formula — compulsory check-off of union dues for members and non-members alike. The agreement was poorly drafted, and did not draw a distinction between "members" of the Police Association and "members" of the force. Section 4 defined members — presumably employees — by reference to an appended Schedule A, which set salaries for the various ranks. Other provisions in the 1969 agreement were the standard no-amendment clause, that the arbitrator had no authority to "alter, amend or modify" any part of the agreement; and a section that guaranteed a clothing allowance for various ranks, including that of inspector.

The agreement was amended in 1970. Most of the new sections simply changed the duration of the agreement. The only important change was the salary Schedule A, which did not list inspectors. From the reported excerpts of the award it is impossible to tell when the inspectors were removed from Schedule A, or how their salaries were set. It is possible that their removal was a clerical error, which would bring the case within the rectification doctrine. It is more likely, however, that the parties viewed the new Schedule A as a supplement to that in the 1969 agreement. It was found that neither party had suggested removal of the inspectors from the employees covered by the agreement.⁷⁶

After the 1970 agreement came into force, six inspectors, claiming they were not "members" under the agreement, refused to pay dues to the Association. The issue for the arbitrator was whether or not inspectors were members. The Board of Commissioners argued that the new Schedule A was exhaustive, and those ranks whose salaries were not set by the 1970 agreement were not, following Section 4, members of the Association. The Association argued that there had been no intention to remove inspectors from the Association; that the 1969 agreement remained in force except where modified by that of 1970; and that other sections, including Section 6 which provided for a clothing allowance, were inconsistent with the exclusion of inspectors from the agreement. Weiler, on behalf of the board, ruled:

With this background, I would decide for the Union on three alternative, though related, bases. If I were to consider the language alone of the 1969 or 1970 documents, on balance I conclude the Union interpretation is more probable. I rely for this conclusion on the fact that the 1969 Agreement is still in existence

⁷⁴ See *Rose v. Pim*, *supra*, note 59. It is otherwise in the United States.

⁷⁵ The award, delivered by Weiler in late 1970 or early 1971 under *The Police Act*, R.S.O. 1970, c. 351, is not reported. It is excerpted most fully in the High Court judgment, 72 C.L.L.C. 14,122.

⁷⁶ *Id.* at 14,509.

except as amended in 1970, that Sections 1, 2 and 10, which originally included the Inspectors, were not explicitly amended by the latter, and that the continued existence of Section 6 is inconsistent with an implied exclusion of Inspectors from the whole of the Agreement by inference from a change in the salary schedule referred to by the amended Section 4. Although I recognize the difficulties in my linguistic interpretation, and reach it primarily because of the greater difficulties in the alternative, I am strongly reinforced in my conclusion by consideration of the extrinsic evidence of negotiating history. On this basis, I find it clear as a matter of fact that the parties have not actually agreed to or intended to exclude Inspectors from coverage of the dues deduction requirement of Section 10. Hence, ambiguities in the interpretation of Section 10 should be resolved in favour of its continued application to the Inspectors.

In the alternative, if I am wrong in believing that Sections 10 et al. are sufficiently ambiguous in meaning to admit of resort to extrinsic evidence for their interpretation then I hold that this is a proper case for the rectification of the latter to bring it into conformity with the binding and written agreement which they reached in April, 1970 and which was to be reflected in the July, 1970 document. This case is closely analogous to the situation dealt with in *Ontario Steel Products* (1970) 21 L.A.C. 430 (Weiler) where I reviewed the authorities and stated that 'the condition for its application [the doctrine of rectification] is that we find an actual, mutual agreement by the parties which is not expressed as intended in the final written document.'⁷⁷

The award was quashed on application to the Ontario High Court, and appeals to the Court of Appeal and the Supreme Court of Canada were dismissed.⁷⁸ It was held at every level that the arbitrator had no power to rectify the agreement. It is quite possible that the *Police Commissioners* case does not present a proper rectification situation, but the courts did not hold that rectification was an inappropriate remedy in the circumstances. They denied that an arbitrator had the power to rectify any agreement.

It should be mentioned here that the requirement in the *Labour Relations Act* that the agreement be "in writing,"⁷⁹ did not enter into these decisions. The nature of the agreement was not a bar to rectification, for the Court of Appeal clearly held that the agreement could be rectified by a court.⁸⁰ The bar, in the courts' view, was the power of the arbitrator.

E. THE EFFECT OF THE *POLICE COMMISSIONERS* CASE

The bulk of each judgment in the *Police Commissioners* case,⁸¹ at both the Court of Appeal and Supreme Court levels, is devoted to the court's power to review the decision of a consensual arbitrator. Chief Justice Laskin noted that the question of rectification was not argued before the Supreme Court,⁸² which saved him the necessity of dealing with his own arguments of 1953.⁸³ In the three decisions there are only three clear statements on rectifi-

⁷⁷ *Loc. cit.*

⁷⁸ *Supra*, note 7.

⁷⁹ R.S.O. 1970, c. 232, s. 1(1)(e).

⁸⁰ 72 C.L.L.C. 14,125 at 14,519.

⁸¹ *Supra*, note 7.

⁸² 74 C.L.L.C. 14,223 at 15,021.

⁸³ In the *Harris* case, *supra*, note 62.

cation. Mr. Justice Hughes, of the Ontario High Court, quoted the no-amendment clause of the agreement and concluded, "This provision evidently stands in the way of any application of the arbitrator's 'doctrine of rectification.'"⁸⁴

The Court of Appeal was somewhat more expansive:

In 'applying the doctrine of rectification' the arbitrator made *two separate and distinct errors*:

i—As a consensual arbitrator he had no power whatever to rectify the collective agreement. If the collective agreement did not represent the true bargain between the parties, the party asserting this to be so could bring an action for rectification, but as Judson, J., said in the *Port Arthur Shipbuilding* case at p. 96 S.C.R. the arbitrator 'had no inherent powers to amend, modify or ignore the collective agreement.'

ii—He ignored an express term of the agreement itself, clause 17 of which reads: 'An arbitrator appointed under Step 5 of the Grievance Procedure shall not have power to add to, subtract from, alter, modify or amend any part of this Agreement, or otherwise make any decision inconsistent with this agreement.' [emphasis added]⁸⁵

And Mr. Justice Spence, dissenting in the Supreme Court on other grounds, addressed the rectification problem in *obiter*: "I agree with the Court of Appeal for Ontario that such exercise of a purported right to rectify is straight in the face of clause 17 of the collective agreement."⁸⁶

It is clear from the Court of Appeal judgment that, aside from any limits the no-amendment clause might put on the arbitrator's powers, those powers are already limited by the nature of his authority. The no-inherent power quote from the *Port Arthur* case is a "separate and distinct" head of objection. It is not dependent on the wording of the collective agreement.

There are, thus, two arguments against the arbitrator's power of rectification: first, that the no-amendment clause forbids it; second, that an arbitrator has no inherent powers to amend, modify, or ignore the agreement. One of the themes of this article has been that these words from the *Port Arthur* case do not mean what the courts have taken them to mean. The argument that *Port Arthur Shipbuilding* does not support a rejection of arbitral rectification power need not be made again. The question of the no-amendment clause still remains. Again, it has a specious applicability. But rectification is not a modification or an amendment of the agreement. On the contrary, it is an enforcement of the agreement. If an alteration has taken place, it occurred in the transcription of the parties' bargain. The arbitrator, in *rectifying* the agreement, returns it to the form the parties had agreed on, thus making it *right*. If a typed, signed copy of an agreement is missing the page which establishes wages, can it be doubted that the arbitrator can, and should, "rectify" the agreement by including the wage settlement inadvertently omitted? Or would the no-amendment clause deny him that right, so that for the life of the agreement the employees could only be paid by suing the

⁸⁴ 72 C.L.L.C. 14,122 at 14,510.

⁸⁵ 72 C.L.L.C. 14,125 at 14,519.

⁸⁶ 74 C.L.L.C. 14,223 at 15,024.

employer in *quantum meruit*? It is inconsistent to deny the arbitrator the power to rectify a word, and yet allow him to rectify a page.

That is the narrow argument. The broader one encompasses all equitable doctrines and relief, and applies to the *Port Arthur* phrase as well as to the no-amendment clause. It is the overriding duty of the arbitrator to apply the law, including the doctrines of equity. Equity truly began, after all, when the Lord Chancellor intervened to keep the common law from being used as an instrument of injustice. To do this, equity allowed the strict terms of a contract to be ignored or held in abeyance in certain circumstances. This is what arbitrators do when an objection to the timeliness of a grievance is deemed to have been waived, although the agreement is clear that such a grievance cannot be heard; when they allow a party to rely on a representation made by the other, although the agreement itself does not support that representation; and when, to avoid the threat of actions hanging over the parties for unreasonable lengths, they apply the doctrine of laches, although by the strict terms of the agreement the action could be brought at any time.

It has been maintained that estoppel, for example, is merely a bar to the exercise of a party's rights in a particular case, rather than a modification of the agreement.⁸⁷ But this is also an amendment to the agreement, for the agreement contemplates no exceptions to its operation. So also is the imposition of damages, where the agreement is silent on the subject, and the reinstatement of an employee who has been unjustly discharged. The broad interpretation given both no-amendment clauses and the *Port Arthur* phrase leads, logically and irresistably, to a rejection of all these equitable doctrines.

The courts have used the most literal interpretation possible, of a phrase taken out of context, to justify limiting the arbitrator's remedial powers. Those limits have never been imposed as thoroughly as they were in the *Police Commissioners* case. Rectification was not merely wrong in this case; the arbitrator, said the court, never had the power to rectify an agreement. Rectification must be done by the courts.⁸⁸ Yet the *Rights of Labour Act*⁸⁹ provides that "[a] collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of *The Labour Relations Act*."⁹⁰ As the courts and the common law do not recognize the enforceability of collective agreements,⁹¹ and have held that the *Rights of Labour Act* precludes any court action involving interpretation of a collective agreement,⁹² it is hard to

⁸⁷ See *Re In'l Longshoremen's Ass'n, Local 1819 and Hamilton Terminal Operators Ltd.* (1966), 17 L.A.C. 181 at 187 (Arthurs), where estoppel is clearly meant although "waiver" is the term used; and *Re Regency Towers Hotel Ltd. and Hotel and Club Employees Union Local 299* (1973), 4 L.A.C. (2d) 440 at 444-45 (Schiff).

⁸⁸ 72 C.L.L.C. 14,125 at 14,519.

⁸⁹ R.S.O. 1970, c. 416.

⁹⁰ *Id.*, s. 3(3).

⁹¹ *Young v. Canadian Northern Railway*, [1931] 1 D.L.R. 645 (P.C.).

⁹² See *Close v. Globe and Mail Ltd.* (1967), 60 D.L.R. (2d) 105 (Ont. C.A.), where it was held that the court had no jurisdiction if it was necessary to interpret a collective agreement and adopt one of several alternative explanations; foll'd in *Drohan v. Sangamo Co. (No. 2)* (1975), 11 O.R. (2d) 65 (H.C.).

see how one could get standing to rectify an agreement — except by reviewing an arbitration decision.

In a recent British Columbia arbitration, *Re British Columbia Transformer Co.*,⁹³ the arbitrator attempted to distinguish the *Police Commissioners* case on the ground, *inter alia*, that it applied only to consensual arbitrators,⁹⁴ and did not affect the powers of those appointed under compulsory arbitration statutes. The attempted distinction is unfortunate, for such cases as *Howe Sound Co.*⁹⁵ and *Port Arthur Shipbuilding*⁹⁶ have held that arbitrators appointed under the British Columbia Act, which requires final settlement "by arbitration or such other method as may be agreed,"⁹⁷ are consensual. The award in the *B.C. Transformer* case also ignored the "no inherent powers" argument in *Prince Arthur* which formed the basis for the *Police Commissioners* decision.

In any case, there is no authority in Canadian law which suggests that statutory and consensual arbitrators apply different law.⁹⁸ The major difference between consensual and statutory arbitrators is that, historically, *certiorari* did not lie against private tribunals.⁹⁹ The courts gradually assumed a special jurisdiction to set aside the award of a consensual arbitrator for error of law.¹⁰⁰ An exception to this rule protects the arbitrator when a specific question of law is referred to him: "To permit the parties to impugn the decision of such Judges [i.e., the arbitrators] on the very matter of law which by agreement of the parties they were to determine would be to countenance a breach of the agreement itself. On the other hand, an intention can usually be imputed to the parties that material matters arising but not specifically referred are to be decided by the proper application of the relevant law and if they are not so decided no breach of the contract arises from a refusal to submit to error in their decision."¹⁰¹ A statutory arbitrator, however, is subject to *certiorari* regardless of the form of submission.¹⁰²

It might be concluded, then, that the consensual arbitrator derives his authority solely from the parties' submission, and is reviewable for applying law not referred to him, just as he is invulnerable when deciding on the law

⁹³ (1975), 11 L.A.C. (2d) 233 (MacIntyre).

⁹⁴ *Re The International Nickel Co. of Canada Ltd. and Rivando*, [1956] O.R. 379 at 385 (C.A.).

⁹⁵ *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers*, [1962] S.C.R. 318 at 330, interpreting a provision requiring settlement by "arbitration or otherwise."

⁹⁶ See *Port Arthur Shipbuilding*, [1969] S.C.R. 85 at 91-94.

⁹⁷ *Labour Code of British Columbia*, S.B.C. 1973 (2d Sess.), c. 122, s. 93(1)(b).

⁹⁸ Adams, *Grievance Arbitration and Judicial Review in North America* (1971), 9 Osgoode Hall L. J. 443, esp. 492 *et seq.*

⁹⁹ *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1952] 1 K.B. 338 at 351 (C.A.), per Denning L.J.

¹⁰⁰ *Loc. cit.*

¹⁰¹ *R. v. Barber, ex p. Warehousemen*, [1968] 2 O.R. 245 (C.A.) at 248.

¹⁰² *Supra*, note 99 at 346-51.

that is so referred. Thus, the consensual arbitrator would have a narrower authority than that of the statutory arbitrator, who would derive his authority from statute and presumably have all the law for his field. But this is simply not the case. The consensual arbitrator is under a duty to decide according to law: this is clearly the rule for commercial arbitrators, for example, and they are consensual arbitrators. The source of the duty to apply the law is not the submission but, as has been shown, stems from the need to conform to the reviewing authority.¹⁰³ This is the same for both statutory and consensual arbitrators. So, while the difference between consensual and statutory arbitrators leads to a technical, if chimerical, difference in the manner and scope of judicial review,¹⁰⁴ it does not in any way affect the jurisdiction of the arbitrator and his authority to apply legal doctrines. There is no reason whatsoever to limit the *Police Commissioners* case to consensual arbitrators.

F. CONCLUSION

In short, the recent application of the *Port Arthur* case has created serious doubts as to the arbitrator's equitable powers. The reasoning in the *Police Commissioners* case leads to the conclusion that he or she has no equitable powers. The trend marked by the *Police Commissioners* case, then, is to separate law and equity. The only power left to the arbitrator would be that of the reader of the agreement; parties with equitable defences, or those seeking equitable remedies, would have to apply to the courts to prohibit a hearing when common law principles conflicted with those of equity.

If arbitrators are to apply the law they must be allowed to apply the principles of equity, for those are now inextricably bound up with those of law. The substantive jurisdiction of the arbitrator is another matter; what is under attack is the power to resolve those issues that *are* properly within his or her authority. The *Port Arthur* case, and the no-amendment clauses that are so common, limit the former. They must not be allowed to erode the latter. For without equitable power, arbitration will become a hollow process, with a hollow power of adjudication, since its power to assess rights will not be matched by its power to enforce them.

¹⁰³ See text at 9.

¹⁰⁴ As the award is found reviewable in almost every case; see Adams, *supra*, note 98.